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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CHARMING BEATS LLC,

Case No.: 21-cv-6193

Plaintiff,

ECF CASE

v.

**AMENDED COMPLAINT AND JURY
DEMAND FOR DAMAGES FOR
COPYRIGHT INFRINGEMENT**

WASATCH ACADEMY,

Defendant.

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Plaintiff CHARMING BEATS LLC, by and through the undersigned counsel, brings this Amended Complaint and Jury Demand against defendant WASATCH ACADEMY for damages based on copyright infringement and related claims pursuant to the Copyright Act and Copyright Revisions Act, 17 U.S.C. §§ 101, et seq. (“the Copyright Act” or “Act”) and violations of the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201-05 (the “DMCA”). Plaintiff alleges below, upon personal knowledge as to itself, and upon information and belief as to other matters so indicated.

JURISDICTION AND VENUE

1. This court has Subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question jurisdiction) and 1338(a) (jurisdiction over copyright actions).

GENERAL AND SPECIFIC JURISDICTION

2. Plaintiff is the exclusive owner of all rights to the copyrighted recording and composition “*Lights Dim*” – U.S. Copyright Registration No. SR 713-284 (the “Copyrighted Track”).

3. Defendant created a video and, without a license or authority, reproduced the Copyrighted Track, and synchronized the Copyrighted Track to the subject video at issue here. (the “Infringing Video”). Defendant, without a license or authority, distributed the Infringing Video to The International Video Institute of New York (“IVINY”) located at 4901 Henry Hudson Pkwy. Riverdale, NY 10471 where it was publicly performed.

4. As of the date of this Amended Complaint, the Infringing Video is active and available to the public, without a license, on the IVINY VIMEO page located at <<https://vimeopro.com/ifiny/international-Video-institute-of-new-york-1/video/27836484>>.

5. Defendant committed a tort in New York by reproducing, synchronizing, distributing, and publicly performed the Copyrighted Track without a license in New York.

6. This Court has general jurisdiction over defendant pursuant to CPLR § 301.

7. Alternatively, defendant is nondomiciliary headquartered in Mount Pleasant, UT.

8. Defendant, without a license or authority, distributed the Infringing Video to YouTube, and Vimeo, among other places. The Infringing Video was, and is, publicly displayed, on defendant’s YouTube, and Vimeo pages.

9. This is a tort committed outside and inside the state.

10. Defendant was put on notice of its infringing activity multiple times, but elected to continue to infringe after each notice.

11. In fact, as of the date of this Amended Complaint, the infringing video at issue is still active on defendant's YouTube and VIMEO pages.

12. Defendant is a national and international boarding school. Defendant states on its website:

Our students come from around the world, and they join the Wasatch Academy community eager to learn and open doors to discovery.

13. Defendant derives substantial revenue from interstate and international commerce.

14. Plaintiff was injured in New York State in multiple way. Plaintiff lost the licensing revenue, owed to plaintiff in this State. The Copyrighted Track was devalued by its association with defendant as described below. Plaintiff's ability to license the Copyrighted Track, from New York State, has been impaired by defendant.

15. Defendant was put on notice by plaintiff, and plaintiff's counsel, multiple times that its infringing activity was having consequences in this state.

16. Defendant elected to continue to infringe, knowing its actions would have consequences in this state.

17. The Copyrighted Track at issue here was used by defendant in its entirety to promote its services and overall institution.

18. Jurisdiction is conferred to this Court over defendant pursuant to CPLR §§ 301 and 302(a)(3)(ii).

VENUE

19. A plaintiff may bring a case in: "(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. . . ; or, (3) if there is no district in which an action may otherwise be brought . . . a judicial district in which any defendant is

Infringing to the court's personal jurisdiction with respect to such action." 28 U.S.C. § 1391(b)(1)-(3).

20. At bar, a substantial part of the events or omissions giving rise to the claim occurred in this Judicial District.

DUE PROCESS

21. There are no due process concerns in light of the fact that defendant committed an intentional tort that it knew had an effect in this Judicial District.

PARTIES

22. Plaintiff CHARMING BEATS LLC is a limited liability company organized under the laws of New York with a headquarters located at 75-10 197th St, 2nd Floor, Flushing, NY 11366.

23. Upon information and belief, defendant WASATCH ACADEMY ("WASATCH") is a corporation organized under the law of the State of Utah with a primary headquarters located at 120 S 100 W, Mount Pleasant, UT 84647. WASATCH may be served with process via its Registered Agent Paul Applegarth, 120 S 100 W, Mount Pleasant, UT 84647.

FACTS

24. Plaintiff is the sole owner by assignment of an original musical composition and recording titled "*Lights Dim*" – U.S. Copyright Registration No. SR 713-284. See **Exhibit 1**.

25. Defendant caused to be produced a video titled "Juice: Video Intensive Project by Michelle Anderer" (the "Infringing Video").

26. Defendant was responsible for overseeing its student Michelle Anderer and failed to prevent the unlicensed reproduction, and synchronization of the Copyrighted Track.

27. Defendant distributed the Infringing Video to YouTube and VIMEO and publicly displayed the Infringing Video on defendant's YouTube and VIMEO pages located at <<https://www.youtube.com/watch?v=IBdG20qn5lQ>> and <<https://vimeo.com/14006251>>.

28. The Infringing Video was distributed to, and publicly performed at, the IVINY. As of the date of this Amended Complaint, the Infringing Video is active and available to the public on the IVINY's Vimeo page at <<https://vimeopro.com/ifiny/international-Video-institute-of-new-york-1/video/27836484>>.

29. Defendant materially contributed the direct infringement by the IVINY.

30. At no time did the defendant have the right to use the Copyrighted Track in any manner.

31. Until in or around April 2020, plaintiff conducted dozens searches of YouTube each year, the Infringing Video did not appear in any of the searches.

32. Plaintiff hired a third-party search firm to assist in its search for individuals and entities that exploit plaintiff's copyrighted recordings and compositions without a license.

33. On or about June 23, 2021, plaintiff received notice from the third-party search firm of the existence of the Infringing Video.

34. Plaintiff notified defendant of the infringement, by email, on the same day it discovered the infringement. See **Exhibit 2**.

35. Defendant did not respond and continued to infringe.

36. On or about October 22, 2021, plaintiff's counsel served a cease-and-desist on defendant demanding it remove the Infringing Video. See **Exhibit 3**.

37. Defendant elected to continue to infringe.

38. On October 27, 2021, counsel for defendant responded requesting time to review the matter. See **Exhibit 4**.

39. On October 28, 2021, counsel for plaintiff responded, and provided the notice that there was no license for defendant's exploitation and infringement of the Copyrighted Track. See **Exhibit 5**.

40. By letter dated November 1, 2021 and sent by email from defendant's counsel to plaintiff's counsel, defendant falsely claimed defendant's use was licensed due to a 2020 license between plaintiff and YouTube. See **Exhibit 6**.

41. At no time did the defendant remove the Infringing Video from its YouTube or VIMEO pages. As of the date of this Amended Complaint, the unlicensed reproductions of the Infringing Video are still active and available to the public.

42. By email dated November 1, 2021, counsel for plaintiff explained:

- (i) plaintiff engaged third-party Haawk less than one year ago, and Haawk, on plaintiff's behalf licensed the track to YouTube not defendant.
- (ii) there is no license from YouTube to defendant. In twelve discreet places in the YouTube Terms and Conditions (and the FAQs, music rights videos, and Copyright Policy which are expressly incorporated into the YouTube Terms and Conditions), YouTube makes it explicitly clear that it does not, and cannot, grant a license for the musical content in the uploaders videos. In fact, YouTube has an entire video, which is part of the Terms and Conditions defendant agreed to when it uploaded the infringing video, detailing the need for defendant to obtain the rights for all music synchronized to any video being uploaded.

See **Exhibit 7**.

43. Defendant uploaded the video to VIMEO and YouTube in 2010. Plaintiff could not have possibly retroactively licensed the infringing uses.

44. There is no agreement between plaintiff and VIMEO.

45. The YouTube Copyright Policy, which is incorporated in the YouTube Terms and Conditions states:

Creators should only upload videos that they have made or that they're authorized to use. That means they should not upload videos they didn't make, or use content in their videos that someone else owns the copyright to, such as music tracks, snippets of copyrighted programs, or videos made by other users, without necessary authorizations.

See **Exhibit 8**.

46. The YouTube music policy states:

If you want to use a well know popular song registered with Content ID, the only way to remove the claim is to get license from the copyright owner.

As a rule of thumb, you must obtain permission from the copyright owner to use any copyrighted material, even when working on strictly non-commercial projects.

1. I can use any music as long as I give credit!

That's not true. Giving credit is nice and is surely appreciated by the artist but it grants you no special rights.

The only exception I can think of is using Creative Commons with Attribution license that actually requires you to give credit, in order to use the music.

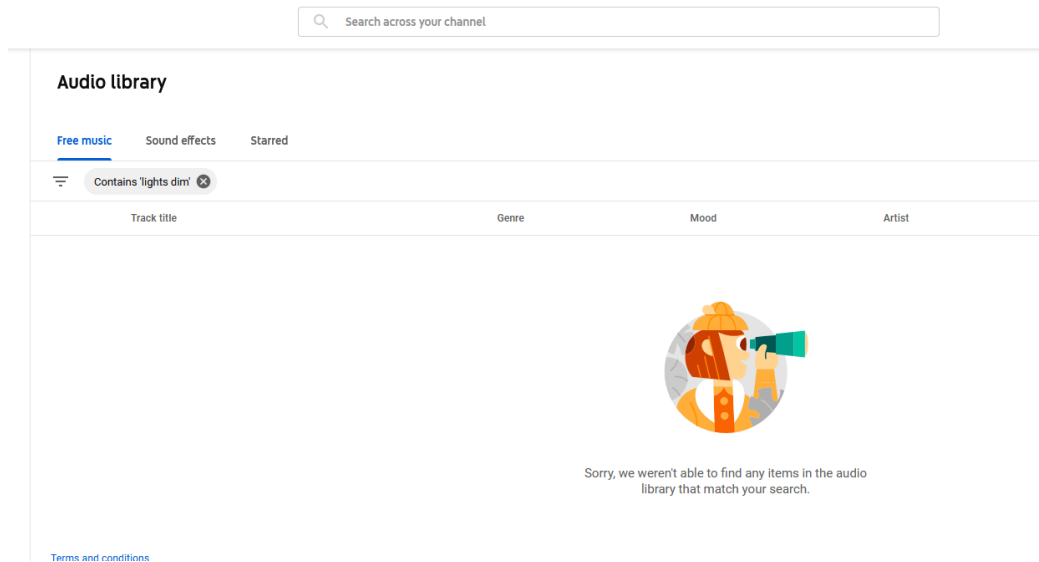
2. I can use any music as long as I don't make profit!

Once again, it does not matter whether you make money from your video or not. You still need permission if you plan to use somebody else's content.

See **Exhibit 9**.

47. Prior to upload, the user is directed by YouTube to check the YouTube audio library to see if the musical track can be used on YouTube without a license. YouTube does maintain a database of free music that can be used without a license.

48. The Copyrighted Track has never been included in the YouTube Creative Commons database.



49. Defendant agreed to the YouTube Terms and Conditions when it uploaded the Infringing Video, and was charged with verifying whether it could reproduce and synchronize the Copyrighted Track prior to upload.

50. There are twelve places in the YouTube Terms and Conditions, and the FAQs, Copyright Policy, videos on music use, and Music Policy (all of which are incorporated in the Terms and Conditions, that warn the uploader it must first get a license before uploading any content it does not own, and YouTube cannot grant a license for any content, particularly music.

51. YouTube also placed a notice under the Infringing Video that it contained plaintiff's Copyrighted Track.

52. At no time did the defendant produce a license, nor did it cease-and-desist.

53. Defendant's failure to comply with the separate notices from YouTube, plaintiff, and plaintiff's counsel evidences defendant's intent to infringe.

54. Defendant knew it was infringing plaintiff's exclusive rights when it synchronized the Copyrighted Track to the Infringing Video. Defendant knew it was infringing plaintiff's exclusive rights when it uploaded the Infringing Video to YouTube.

55. Defendant certainly knew it was infringing plaintiff's rights to the Copyrighted Track after the multiple notices, and demands to cease-and-desist.

56. Defendant infringed plaintiff's exclusive rights as set forth in Section 106 of the Act and its knowledge of the infringement and failure to comply with multiple notices satisfies the standard for enhanced damages set forth in Section 504(c) of the Act.

57. Defendant's acts demonstrate the callous disregard the defendant has to its legal responsibilities, and only an award at the top of the statutory scale will serve to stop defendant from routinely violating the Copyright Act.

ADDITIONAL DAMAGE TO PLAINTIFF

58. Defendant is one of eleven such schools currently administered by the Presbyterian Church throughout the contiguous United States.

59. Plaintiff has licensed the Copyrighted Track to companies like Dive Soap, DC Shoes, and for use in the Spiderman PS4 video-game.

60. Plaintiff does not, under any circumstances, license its tracks to any entity with a religious affiliation because it devalues the broad-based appeal of the track.

61. Had the defendant sought a license, it would have been rejected.

62. The forced association of the Copyrighted Track with defendant has damaged the ability to license the Copyrighted Track in an amount to be determined at trial.

DMCA VIOLATIONS

63. Defendant did not include any identifying information in the Infringing Video which would have allowed plaintiff to identify defendant's use of the Copyrighted Track. Specifically, the Infringing Video omits the Copyrighted Track's title, album name, author, label, and copyright owner (the "Copyright Management Information").

64. Defendant refused to provide the correct Copyright Management Information even after it was served with multiple notices, and the Amended Complaint in this action.

65. Defendant's removal and/or failure to include any copyright management information, particularly after notice, are violations of 17 U.S.C. § 1202 – the DMCA. Plaintiff is entitled to up to \$25,000 for each violation of the DMCA pursuant to Section 1203 of the DMCA.

FIRST CLAIM FOR RELIEF COPYRIGHT INFRINGEMENT

66. Plaintiff incorporates the allegations contained in the preceding paragraphs as if set forth here at length here.

67. It cannot be disputed that the plaintiff has a valid, registered copyright, and owns all rights to the Copyrighted Track.

68. Defendant without authority from plaintiff, reproduced, distributed, publicly displayed, and/or synchronized plaintiff's Copyrighted Track in its entirety to the Infringing Video.

69. Defendant created and displayed the Infringing Video for the sole purpose of commercial gain.

70. Defendant refused to cease-and-desist after multiple demands from plaintiff directly, and through plaintiff's counsel.

71. Defendant's use of the Copyrighted Track was not for criticism, comment, news reporting, teaching, scholarship, or research.

72. Defendant's use was not transformative.

73. Defendant elected to reproduce, synchronize, and/or distribute plaintiff's Copyrighted Track, using the entirety of the track, without a license.

74. As a direct and proximate result of defendant's infringement of plaintiff's exclusive rights to the Copyrighted Track as set forth in Section 106 of the Act, plaintiff has incurred damages, and requests an award of defendant's profits in excess of plaintiff's compensatory damages, and plaintiff's compensatory damages, plus costs, interest, and reasonable attorneys' fees. Plaintiff may also elect to recover a statutory damage award pursuant to 17 U.S.C. § 504(c)(2) for willful infringement of up to \$150,000, but not less than \$30,000 plus costs, interest, and reasonable attorneys' fees.

**SECOND CLAIM FOR RELIEF
VIOLATION OF DMCA OF 1998, AS AMENDED,
17 U.S.C. §§ 1201, et seq.**

75. Plaintiff incorporates the allegations contained in the preceding paragraphs as if set forth at length here.

76. Plaintiff always distributes its copyrighted recordings, including the Copyrighted Track here, with copyright management information including the title, author, label, and copyright owner.

77. Defendant removed plaintiff's copyright management information, and copied, synchronized, publicly displayed, and/or distributed the Copyrighted Track.

78. Defendant failed to include any information which identified the Copyrighted Track, the author of the Copyrighted Track, the owner of any right in the Copyrighted Track, or information about the terms and conditions of use of the Copyrighted Track.

79. Defendant continued to publicly display the Infringing Video with no attribution after YouTube, plaintiff, and plaintiff's counsel separately informed defendant that it was infringing plaintiff's rights to the Copyrighted Track.

80. Defendant violated the DMCA each time it wrongfully distributed the Infringing Video.

81. Defendant did the forgoing with the intent to conceal the infringement.

82. Plaintiff seeks award of statutory damages for each violation of Section 1202 of the DMCA in the sum of \$25,000.

**THIRD CLAIM FOR RELIEF
CONTRIBUTORY COPYRIGHT INFRINGEMENT**

83. Plaintiff incorporates the allegations contained in the preceding paragraphs as if set forth here at length here.

84. As described above, defendant materially contributed to the direct infringement of third-party The International Video Institute of New York.

85. As a direct and proximate result of defendant's contributory infringement of plaintiff's exclusive rights to the Copyrighted Track as set forth in Section 106 of the Act, plaintiff has incurred damages, and requests an award of defendant's profits in excess of plaintiff's compensatory damages, and plaintiff's compensatory damages, plus costs, interest, and reasonable attorneys' fees. Plaintiff may also elect to recover a statutory damage award pursuant to 17 U.S.C. § 504(c)(2) for willful infringement of up to \$150,000, but not less than \$30,000 plus costs, interest, and reasonable attorneys' fees.

**FOURTH CLAIM FOR RELIEF
VICARIOUS COPYRIGHT INFRINGEMENT**

86. Plaintiff incorporates the allegations contained in the preceding paragraphs as if set forth here at length here.

87. As described above, defendant had the right and ability to supervise or control the infringing activity of third-party infringer Michelle Anderer.

88. Defendant reaped a direct financial benefit from that activity of Anderer, and attracted students to its film program by the wide dissemination of the Infringing Video.

89. As a direct and proximate result of defendant's vicarious infringement of plaintiff's exclusive rights to the Copyrighted Track as set forth in Section 106 of the Act, plaintiff has incurred damages, and requests an award of defendant's profits in excess of plaintiff's compensatory damages, and plaintiff's compensatory damages, plus costs, interest, and reasonable attorneys' fees. Plaintiff may also elect to recover a statutory damage award pursuant to 17 U.S.C. § 504(c)(2) for willful infringement of up to \$150,000, but not less than \$30,000 plus costs, interest, and reasonable attorneys' fees

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays for judgment against defendant, and awarding plaintiff as follows:

1. restitution of defendant's unlawful proceeds in excess of plaintiff's compensatory damages;
2. compensatory damages in an amount to be ascertained at trial;
3. statutory damages to plaintiff according to proof, including but not limited to all penalties authorized by the Copyright Act (17 U.S.C. §§ 504(c)(1), 504(c)(2));
4. an award of statutory damages for each violation by defendant of the DMCA, 17 U.S.C. § 1202;

5. reasonable attorneys' fees and costs (17 U.S.C. § 505);
6. pre- and post-judgment interest to the extent allowable; and,
7. such other and further relief that the Court may deem just and proper.

Plaintiff hereby demands a trial by jury of all issues so triable.

Dated: November 18, 2021
New York, New York

GARBARINI FITZGERALD P.C.

By: 
Richard M. Garbarini (RG 5496)